

The Board's authority is limited when reviewing a preliminary hearing order. The Board can consider only whether the ALJ has exceeded his/her jurisdiction. K.S.A. 1999 Supp. 44-551. This limited review includes the issues the legislature has labeled jurisdictional in K.S.A.

1999 Supp. 44-534a. Whether claimant's injury arose out of and in the course of employment is one of those jurisdictional issues.

The primary question here is whether claimant's alleged knee injury of May 14, 1999, constituted a new injury or was, instead, only a direct and natural consequence of an earlier noncompensable injury. Claimant first testified at a preliminary hearing on September 2, 1999. Following that hearing, the ALJ ordered an IME with Dr. Sergio Delgado. Claimant testified a second time at a preliminary hearing on January 27, 2000. After the second preliminary hearing, the ALJ entered the Order for temporary total disability compensation and medical treatment that is now the subject of this appeal.

The evidence shows that claimant suffered a noncompensable injury to her knee in November 1998 when her leg caught as she stepped over a seat on an airplane. As a result, claimant underwent surgery for a torn ACL in December 1998. Dr. Knappenberger followed claimant post-operatively until May 11, 1999. Dr. Knappenberger then released claimant with directions to return as needed. At that time Dr. Knappenberger noted claimant continued to have problems with instability, but he found no effusion and expected the instability to improve with strengthening.

On May 14, 1999, three days after being released by Dr. Knappenberger, claimant stepped off a curb while performing her job as a delivery driver for respondent and experienced a sharp pain in her left knee. As claimant then entered her vehicle, the car door struck her knee causing further pain. By the time claimant reached her next stop, seven miles away, the knee had become swollen and claimant had difficulty putting weight on the left leg. Claimant reported the knee problems to her employer and went to the emergency room. On May 17, 1999, claimant saw Dr. Knappenberger. Dr. Knappenberger found some effusion, prescribed a repeat injection, and recommended claimant be off work. Dr. Knappenberger, and later Dr. C. Vosburgh, continued to treat claimant. Their records state their impression that claimant suffers from a knee strain.

As to whether claimant suffered new injury in May 1999, Dr. Knappenberger states in his notes of August 25, 1999:

It is certainly possible that the injury of May 14, 1999, is related to the original injury. . . .

It is difficult to determine if there has been any further actual ligament or soft tissue injury to the knee with the second injury. She has complained of more pain, but examinations do remain relatively unchanged from the original injury.

Following the first preliminary hearing, the hearing of September 2, 1999, the ALJ ordered an independent medical examination by Dr. Delgado. The ALJ's Order asks Dr. Delgado to determine whether claimant's knee "symptoms were aggravated, caused or accelerated by an incident occurring on May 14, 1999." Dr. Delgado's report answered that question as follows:

It appears that Ms. Ditch's complaints are a natural and probable consequence of the prior left knee injury with the degenerative arthritic changes being a natural consequence of anterior cruciate damage with instability. Her symptoms were aggravated by the injury sustained and this aggravation has resolved at this time.

After receiving the report from Dr. Delgado, a second preliminary hearing was held. At the second hearing, held January 27, 2000, claimant offered a note from Dr. Knappenberger stating that claimant should continue to be off work until the next appointment scheduled for February 23, 2000. From this evidence, respondent argues claimant has not proven she sustained injury on May 14, 1999, and argues that even if she did sustain a temporary injury, that injury has now resolved.

Although respondent makes a strong argument, the Board concludes the decision by the ALJ should be affirmed. In our view, the evidence does establish that the injury of May 14, 1999, produced increased symptoms that required treatment and took claimant off work. Although Dr. Delgado considered the condition to be resolved, Dr. Knappenberger continued to treat and to keep claimant off work. The evidence presents a quite close question but the Board agrees with the decision to award the medical treatment by Dr. Knappenberger and temporary total disability compensation until claimant reaches maximum medical improvement. Whether the injury of May 14, 1999, produced permanent impairment remains undetermined.

Respondent also contends the medical treatment ordered is not necessary to cure or relieve the symptoms from the May 14, 1999 injury. The argument rests on the report from Dr. Delgado stating the aggravation of the injury has resolved. As indicated, Dr. Knappenberger continues to recommend claimant be seen. But the question of whether medical treatment is necessary is not, as an issue separate from whether the injury arose out of employment, a jurisdictional issue and the Board does not have authority to consider the question at this stage of the proceedings. The same is true of respondent's argument that the ALJ erred by refusing to allow respondent additional time to present deposition testimony of Dr. Knappenberger.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Brad E. Avery on January 27, 2000, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

c: Thomas O. Rost, Topeka, KS
Matthew S. Crowley, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director